Sharifah Mastura bte Tuanku Ibrahim v Wan Aziz Ibrahim

HIGH COURT (KUCHING) — ORIGINATING MOTION NO KG 17 OF 1992
ABDUL KADIR SULAIMAN J
26 JULY 1993

Land Law *— Restraints on dealings — Caveats — Caveatable interest — Entry of private caveat by registered proprietor over own land — Onus of proof — Whether registered proprietor had caveatable interest — Sarawak Land Code (Cap 81) s 173*

The applicant, by a statutory declaration, declared that she had executed a power of attorney whereby she appointed the respondent as her attorney to do all acts and deeds relating to her properties, including a parcel of land ('the said land'). It came to the applicant's notice that the respondent, who was also given a power of attorney by her brother, was being sued by her brother for failing to account to him under the power of attorney. As a result, the applicant conducted a search and discovered that her properties had been caveated by the respondent based on a trust deed purportedly declared by her. The applicant lodged a caveat over the properties to protect her interests, pending her application to the court for removal of the respondent's caveat and for revocation of the power of attorney.

Subsequently, the applicant was served a notice by the assistant registrar pursuant to s 178 of the Sarawak Land Code (Cap 81) ('the Code'), on account of the respondent having applied to register a memorandum of transfer. The applicant was given three months' notice and after the lapse of the said period, in so far as it affects the said land, the caveat would be deemed to have lapsed and be removed. The applicant applied for an order that the caveat should not lapse and should remain until further order of the court. By a writ of summons dated 4 January 1993, the applicant commenced a separate suit against the respondent. The issue for the court to decide was whether a registered proprietor, in the capacity of the applicant and in the circumstances, could make use of the provisions in s 173 of the Code to lodge a private caveat over the properties.

Held, dismissing the application:

(1) A registered proprietor of land was not entitled to enter a private caveat in respect of his own land unless he could show some circumstances which affirmatively gave rise to a distinct interest in the land other than the fact that he was the registered proprietor of the property. The onus was on the registered proprietor/caveator to satisfy the court that he had a caveatable interest within the exception.

(2) The pending suit relied upon by the applicant as a basis to allow the said caveat to remain, clearly did not support any claim to an interest in the said land distinct from the interest of the applicant in it as a registered proprietor to entitle her to lodge a private caveat under s 173 of the Code. Therefore, the applicant had no caveatable interest over the said land.

Per curiam:
A serious issue to be tried in an action would only be relevant when considering whether a proper and valid caveat ought to be removed pending the disposal of the action relating to the caveat. Having a serious issue to be tried in a pending action does not clothe a person with a caveatable interest over land. In the present proceedings, the court was concerned with the right to caveat own registered properties and not over means of preventing own registered properties from being disposed of pending determination of disputes in a court of law. A registered proprietor as such may have other means to do that but if she chooses to do it by means of a private caveat, she must establish locus standi to caveat her own property.

[Bahasa Malaysia summary

Pemohon, melalui suatu deklarasi statutori, telah mengakui bahawa beliau telah menyempurnakan suatu surat kuasa wakil di mana beliau telah melantik responden sebagai wakilnya untuk melakukan semua perbuatan dan tindakan berkenaan dengan hartanya, termasuk sebidang tanah ('tanah itu'). Pemohon kemudiannya telah mendapat khabar bahawa responden, yang juga telah dilantik oleh abang pemohon sebagai wakilnya, telah didakwa oleh abang pemohon kerana gagal untuk memberi penjelasan kepadanya di bawah kuasa wakilnya. Oleh itu, pemohon telah membuat carian dan mendapati bahawa hartanya telah dikaveatkan oleh responden berdasarkan suatu surat ikatan amanah yang dikatakan telah diakui olehnya. Pemohon telah memasukkan suatu kaveat ke atas hartanya untuk melindungi kepentingannya, semasa menunggu permohonannya ke mahkamah untuk pembatalan kaveat responden dan penarikbalikan surat kuasa wakil itu.

Kemudiannya, pemohon telah disampaikan dengan suatu notis yang dikeluarkan oleh penolong pendaftar di bawah s 178 Kanun Tanah Sarawak (Cap 81) ('Kanun itu') akibat permohonan responden untuk mendaftarkan suatu memorandum pindahmilik. Pemohon telah diberi notis tiga bulan dan selepas tempoh itu, setakat yang berkaitan dengan tanah itu, kaveat itu akan disifatkan sebagai telah luput dan diketepikan. Pemohon telah memohon untuk suatu perintah supaya kaveat itu tidak diluputkan dan sepatutnya ditinggalkan sehingga perintah lanjut mahkamah. Pemohon telah memulakan suatu tindakan berasingan terhadap responden melalui suatu writ saman yang bertarikh 4 Januari 1993. Isu untuk pertimbangan mahkamah adalah sama ada

A seseorang tuan punya tanah berdaftar, dengan sifat pemohon dan di dalam keadaan sedemikian, boleh menggunakan peruntukan di dalam s 173 Kanun itu untuk memasukkan kaveat persendirian keatas hartanya sendiri.]

B **Diputuskan**, menolak permohonan itu:

(1) Seorang tuan punya tanah berdaftar tidak layak untuk memasukkan suatu kaveat persendirian ke atas tanahnya sendiri kecuali jika beliau boleh menunjukkan keadaan yang dengan jelas menimbulkan dengan jelas suatu kepentingan di dalam tanah itu selain daripada hakikat bahawa beliau adalah tuan punya tanah C berdaftar itu. Beban membukti terletak pada tuan punya tanah berdaftar/pengkaveat itu untuk memuaskan hati mahkamah bahawa beliau mempunyai suatu kepentingan yang boleh dikaveatkan di bawah pengecualian itu.

(2) Tindakan yang belum selesai yang digunakan oleh pemohon sebagai asas bagi penetapan kaveat, jelas tidak menyokong sebarang D tuntutan terhadap kepentingan di dalam tanah itu selain daripada kepentingan pemohon sebagai tuan punya tanah berdaftar, untuk melayakkan pemohon memasukkan kaveat persendirian di bawah s 173 Kanun itu. Oleh itu, pemohon tidak mempunyai kepentingan di dalam tanah yang boleh dikaveatkan.

E

Per curiam:

Sesuatu isu serius yang perlu dibicarakan di dalam suatu tindakan hanya menjadi relevan apabila mempertimbangkan sama ada suatu kaveat yang wajar dan sah patut dibatalkan semasa menunggu penyelesaian tindakan berkenaan kaveat itu. Sesuatu isu serius yang F perlu dibicarakan dalam tindakan yang belum diselesaikan tidak menyelubungi seseorang itu dengan kepentingan dalam tanah yang boleh dikaveatkan. Dalam prosiding ini, mahkamah menumpukan perhatian kepada hak untuk memasukkan kaveat ke atas harta yang didaftarkan dalam nama sendiri dan bukan cara untuk menghalang G harta tersebut daripada dilupuskan sementara menunggu penyelesaian pertikaian di mahkamah. Oleh itu seseorang tuan punya tanah berdaftar mungkin mempunyai cara lain untuk melindungi kepentingannya, tetapi jika beliau memilih untuk bertindak sedemikian melalui suatu kaveat persendirian, beliau mesti menunjukkan locus standi untuk memasukkan kaveat ke atas hartanya sendiri.]

H

Notes

For cases on caveatable interests in land, see 8 *Mallal's Digest* (4th Ed) paras 1709–1746.

I **Cases referred to**

1 *Eu Finance Bhd v Siland Sdn Bhd (M & J Frozen Food Sdn Bhd, Intervener)* [1989] 1 MLJ 195 (folld)

2 *Asia Commercial Finance (M) Bhd & Anor v Development & Realtor Sdn Bhd* [1992] 2 MLJ 504 (folld)

3 *Re An Application by Haupiri Courts Ltd (No 2)* [1969] NZLR 353 (refd)

Legislation referred to
Sarawak Land Code (Cap 81) s 173

Chan Siew Yan (Ee & Lim) for the applicant.
P Phang (Tan Cho Huat with him) *(Reddi & Co)* for the respondent.

Cur Adv Vult

Abdul Kadir Sulaiman J: This is an application by the applicant for an order that her caveat against a parcel of land known as Lot 678, Block 12, Muara Tebas Land District ('the said land') should not lapse and should remain until further order of this court. As a registered proprietor and by virtue of a statutory declaration, the applicant caveated various parcels of her land. One of the parcels of land in question is the said land. The caveat was registered at the Kuching land registry office on 30 January 1992 as Instrument No L 1527/1992 ('the said caveat'). This application was made in consequence of her receipt of a notice by the assistant registrar, Land and Survey Department, Kuching pursuant to s 178 of the Sarawak Land Code (Cap 81), ('the Code'), giving her the required three months' notice wherein after the lapse of the said period, in so far as it affects the said land, the said caveat shall be deemed to have lapsed and the said caveat shall be removed.

In order to succeed in her application, the applicant must establish that she has a caveatable interest over the said land. Section 173 of the Code states as follows:

> Any person—
>
> (a) claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or transmission, or of any trust express or implied or otherwise howsoever;
> (b) who is a guardian of the property of an infant beneficially interested in any land or any estate or interest therein; or
> (c) transferring any estate or interest under this Code to any person to be held in trust,
>
> may at any time lodge with the Registrar a caveat in Form O in the First Schedule.

In as far as her application before this court is concerned, sub-paras (b) and (c) do not apply. She is to establish that she has a caveatable interest pursuant to sub-para (a) of s 173. Under this sub-paragraph she must be a person claiming to be entitled to or to be beneficially interested in any land, estate or interest under the Code and that she is so claiming by virtue of any unregistered agreement or other instrument or transmission, or of any trust, express or implied or otherwise howsoever.

At the time of the lodging of the said caveat, the applicant filed with the registrar a statutory declaration giving reasons for wanting to caveat her

properties. According to the declaration, by a power of attorney executed on 22 May 1986 which was registered as Instrument No L 9391/1986 on 13 August 1986, she appointed the respondent to be her attorney to do, execute and perform all or any acts, deeds, matters and things named therein relating to her properties (which include the said land). Subsequently it came to her notice that the attorney, who was also given a power of attorney by her brother, was being sued by her brother for failing to account to him under the power of attorney. Her brother lodged a caveat registered as Instrument No L 8028/1991 on his own properties to protect his interest. On account of the lodgment of the caveat by the brother, a purported trust deed mysteriously appeared whereby her brother's attorney and his siblings claimed ownership of the properties of the brother. Because of this incident, she made a search in regard to her own properties and she discovered that her properties too had been caveated by the respondent based on a trust deed supposedly declared by her, which according to her was untrue. So being the registered owner of her properties, she found it necessary to protect her interests in a similar way by lodging a caveat over the properties while she sought the assistance of a lawyer to make an application to court for the removal of the respondent's caveat over her properties and also to have the power of attorney, previously given by her to the respondent, revoked so that her interest in the properties would not be jeopardized by her attorney, the respondent, by freely dealing with her properties pursuant to the aforesaid power of attorney. So it can be seen the purpose of her caveating her properties was to forestall any attempted dealings by the respondent over her properties pending her action against the respondent as intended. Thus she caveated her properties wherein she is the registered proprietor, solely to prevent the properties from being taken away out of her proprietorship.

Having lodged the said caveat with the aid of the statutory declaration and the said caveat duly registered on 30 January 1992, she was served with the s 178 notice by the assistant registrar of the Land and Survey Department, Kuching on 22 August 1991 for the reason that the respondent through his counsel has made application to the registrar for the registration of a memorandum of transfer affecting the said land. Early this year, by a writ of summons dated 4 January 1993, she filed a suit against the respondent in Suit No 1 of 1993(I) claiming for:

(1) an account of what was due to her in respect of money received by the respondent acting as her attorney;
(2) a full report of steps taken by the respondent as attorney to ensure proper and fair compensation was given by the government over any of her properties acquired or to be acquired;
(3) a full report of all other acts, deeds, matters, things done by the respondent as attorney;
(4) an order that the power of attorney be or stand revoked and that the respondent do execute the necessary consent for revocation of the power of attorney;
(5) an order for the removal of the respondent's caveat over her properties;
(6) a declaration that the trust deed dated 12 April 1991 was null and void

and of no effect or alternatively, for an order that it stands revoked and of no effect; A

(7) damages to be assessed, interest and costs; and

(8) such other order or relief as the court deems fit.

It is to be noted that in the suit by the applicant against the respondent there was no prayer in relation to the said caveat but instead a prayer for the B removal of the respondent's caveat placed on her properties mentioned earlier. However, in the affidavit of the counsel for the applicant, Chan Siew Yan, affirmed on 4 January 1993, the deponent deposed that the said caveat of the applicant should remain in the register to maintain the status quo since the applicant by her suit against the respondent is challenging the C trust deed and by virtue of the fact that the applicant clearly has interests in the said land as legal owner and registered proprietor thereof. There is no assertion that the applicant is so claiming by virtue of any unregistered agreement or instrument or transmission, or of any trust express or implied.

The issue for me to decide is whether a registered proprietor in the capacity of the applicant and in the circumstances, can make use of the D provisions in s 173 of the Code to lodge a private caveat over the properties. There are decisions by judges of High Courts in relation to proceedings under s 323 of the National Land Code 1965, concerning persons eligible to lodge private caveats. That section is in pari materia with s 173 of the Code. Two such cases cited before me are *Eu Finance Bhd v Siland Sdn Bhd (M & J Frozen Food Sdn Bhd, Intervener)*[1] and *Asia Commercial Finance (M) Bhd & Anor v Development & Realtor Sdn Bhd.*[2] E

LC Vohrah J in the former case at p 196 has this to say:

> I do not think Siland [ie the registered proprietor/caveator] can successfully bring itself within the first limb [of s 323(1)(a) of the National Land Code 1965] in the light of its plain meaning because in my view a person who relies on his status as F registered owner must necessarily be a person already possessing title or interest in the land and not merely a person claiming title to or any interest in that land and must as a matter of logic have been excluded by the language of s 323(1). As has been very succinctly put by the learned author Judith E Sihombing in her *National Land Code* (1981 Ed) at p 594, 'one difficulty involved is that of deciding his standing under s 323 for he is not "claiming" title to the land: title G is already his'.

In the same case, the learned judge cited the case of *Re An Application by Haupiri Courts Ltd (No 2)*,[3] where Richmond J elaborated at p 357:

> He must go further and establish some set of circumstances over and above his H status as registered proprietor which affirmatively gives rise to a distinct interest in the land. In such circumstances it would seem that the fact that he is the registered proprietor of an estate or interest under the Act may not prevent him lodging a caveat ... In *Re Grand Trunk Pacific Development Co Ltd* (1912) 7 DLR 611, 613, Lamont J stressed the requirement that a caveator must derive the interest which he claims through the transaction (in that case an unregistered I agreement) on which the caveat is founded and not from his existing status as registered proprietor. I respectfully agree with that view ... An unduly extensive right to caveat could well lead to an unwarranted interference with the interests of others endeavouring to obtain registration of dealings. Moreover, the registered

A proprietor, in a case such as the present, is not without his remedy, for he may apply to this court for an interim injunction against registration.

Edgar Joseph Jr J (as he then was) in the latter case had this to say at p 515:

> The opposite opinion was expressed by Richard Talalla JC (as he then was) in *Hiap Yiak Trading Sdn Bhd & Ors v Hong Soon Seng Sdn Bhd* [1990] 2 MLJ 155.
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> B The opinion of Richard Talalla JC (as he then was) has come under heavy criticism by Mr Teo Keang Sood in his well researched article 'Caveating One's Own Land: Cold Comfort for the Registered Proprietor' [1991] 1 MLJ xxxiv.
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> With respect, I would express a preference for the opinion expressed by LC Vohrah J [ie in *Eu Finance*'s case] for the cogent reasons given by Mr Teo Keang Sood.

C So, the ratio is that a registered proprietor of land is not entitled to enter a private caveat in respect of his own land unless he can show some circumstances which affirmatively give rise to a distinct interest in the land other than the fact that he is the registered proprietor of the property. The onus is on the registered proprietor/caveator to satisfy the court that he has D a caveatable interest within the exception. So, the applicant in the present application must discharge the burden in order to entitle her as the registered proprietor to caveat her properties which include the said land.

The learned counsel for the applicant in her submissions concedes that to maintain the applicant's said caveat, she must show that she has a E caveatable interest in the said land. This issue, according to the learned counsel, has been established by the fact that there is a pending action to determine the status of the trust deed wherein pursuant to it the respondent is claiming equitable ownership in the applicant's properties. The respondent has in fact lodged a caveat by virtue of that alleged equitable interest. Under such circumstances, says the learned counsel, pending the determination F of the status of the trust deed, it is not for this court to determine only on affidavit evidence such a serious issue which goes to the very heart of the indefeasibility of title concept central to the Torrens system. I take by the learned counsel's submission to mean that as long as there is a serious issue to be tried in an action, the caveatable interest of the registered proprietor G of land is established. If that be so, I am afraid that she is greatly mistaken. A serious issue to be tried in an action is only relevant when considering whether a proper and valid caveat ought to be removed pending the disposal of the action relating to the caveat. Having a serious issue to be tried in a pending action does not clothe a person with a caveatable interest H over land. In the present proceedings, the court is concerned with the right to caveat own registered properties and not over means of preventing own registered properties from being disposed of pending determination of disputes in the court of law. A registered proprietor as such may have other means to do that but if she chooses to do it by means of a private caveat she must establish locus standi to caveat her own property. In the instant case, I I am afraid I cannot find evidence that the applicant has established some set of circumstances over and above her status as registered proprietor which affirmatively gives rise to a distinct interest in the land to entitle her as a registered proprietor to lodge a private caveat over the said land. The

pending suit, relied upon by the applicant as a basis to allow the said caveat to remain, clearly does not support any claim to an interest in the said land distinct from the interest of the applicant in it as a registered proprietor to entitle her to lodge a private caveat under s 173 of the Code. In the circumstances, the applicant has no caveatable interest over the said land and therefore, the application of the applicant is dismissed with costs to the respondent to be taxed unless agreed.

Application dismissed.

Reported by Yap Foo Ken